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solicited benefactor of children who prefer their father living." After a thorough discussion of a number of cases in point, the court states that the law does not open the door to anything so shocking as a discussion of the point whether the death of a parent was an actual loss or gain.

PROBATE OF WILLS—EXECUTOR'S COSTS WHERE WILL IS REJECTED.—On the application of the executor named in a will, rejected on an issue of *devisavit vel non* for lack of testamentary capacity, for an allowance out of the estate for costs and counsel's fees, it was *Held*, that such allowance was proper. *In Re Estate of Pritchard* (Sup. Ct. Dist. Columbia), 30 Wash. Law Reporter, 9.

In the course of the opinion Mr. Justice Barnard said:

"The courts of Maryland have frequently held that it is proper to allow such costs and expenses to an executor for a trial which results in a verdict against a will, wherever such will has first been admitted to probate and letters testamentary issued, although such probate and grant of letters may have been practically *ex parte*.

"It seems to me that the spirit of these decisions would require an executor who files a petition for the probate of a will under our present statute, in good faith, to defend the will before probate, and to do all that was proper to obtain probate of the same. The executor is not a volunteer; and his selection is presumed to have been made because of the confidence placed in him by the testator; and if he should surrender, at the firing of the first gun, after accepting the trust, he would hardly be considered a faithful trustee. . . .

"After trial, however, and these issues having been withdrawn, and the issue as to capacity having been fairly submitted to the jury, and determined against the will, it was a very proper thing for counsel for the executor to advise that no further proceedings or contest be had. As executor, the petitioner could not be expected to go further.

"If, after that point was reached, and one named as beneficiary under the will had desired further litigation, the executor could properly have said to him that it must be had at his own cost and risk; but up to that point, in a case such as this, it appears to me proper for the court to protect him, and to approve the payment of reasonable costs and expenses incurred. . . .

"The recent case of *Tuohy, Administrator*, v. *Hanlon*, decided by the Court of Appeals of this District, in May last (29 Wash. L. R. 417), seems to be conclusive as to the authority of this court in a case like this. . . .

"Here the caveatee has succeeded in obtaining a successful result as to two of the three issues framed; and to that extent at least had just cause for resisting the attack on the will. The testimony at the trial also shows that there was probable grounds for sustaining the will on the other issue as to testamentary capacity, for there was great difference of opinion and conflict of testimony on that subject. . .

"As the Court of Appeals says, in said case of *Tuohy, Administrator* v. *Hanlon*, an executor derives his authority from the will and not from the court; and he 'derives his interest in the estate of the deceased entirely from the will and becomes vested with that interest from the moment of the testator's death.'

"Having the authority and interest from the testator, who was presumed to be of sound mind until the verdict of the jury was rendered, it was not within the duty of the executor in this case to withdraw from the trust it had accepted; and the reasonable cost of the trial of the issues must be regarded as an expense of administration.

"The court in said case says further, on this point:

"'What the next of kin are entitled to in the distribution of an estate, is not the whole estate left by the deceased, but that estate as shown to exist after the allowance of the reasonable costs of administration.' . . .

"A last will and testament is a solemn instrument, and a testator who legally has the dominion over his estate, and the power to appoint an executor to carry

out the dispositions he desires to make of it, should be allowed to close his eyes in death with the assurance at least that a reasonable effort will be sanctioned by the law to sustain his will, at the expense of his own estate. If the share that would otherwise have gone to his next of kin shall be lessened thereby, it is presumably caused by the testator himself, who had the right, *prima facie*, to appropriate his property as he might see fit; and the formal execution of his will should ordinarily authorize his executor to use a reasonable part of his estate to establish and carry out that will."

Among the authorities cited by the court is the Virginia case of *Roy* v. *Roy*, 16 Gratt. 418, where "costs" were allowed to an executor, in an unsuccessful suit to sustain the will. Other cases cited are: *Meeker* v. *Meeker*, 74 Iowa, 352; *Phillips' Will*, 81 Ky. 328; *Day* v. *Day*, 3 N. Y. Eq. 549; *Lassiter* v. *Travis*, 98 Tenn. 330; *Comstock* v. *Hadlyme Ec. Soc.*, 8 Conn. 254.

BANKRUPTCY.—The ruling in *Pirie* v. *Trust Company*, 182 U. S. 438, 21 Sup. Ct. 906, commented upon *ante*, p. 438, continues to receive the attention of the subordinate courts of bankruptcy. This has been shown in our November and December numbers, but in *Re Dickson*, 111 Fed. 726, the Circuit Court of Appeals for the First circuit boldly takes the position that as to one phase of the facts presented there, the Supreme Court cannot have meant what it said in the *Pirie* case, and states in terms that there is even a limit to the extent to which a lower court is bound to follow a construction of a statute by the Supreme Court. It rules in substance that a creditor who has within four months received payments in good faith will not be held to have received a preference where the result of sundry transactions is an increase of the net indebtedness to him and a corresponding decrease of the bankrupt's assets.

The opinion of Putnam, Circuit Judge, is so frank in its statement of the intention of his court to do a somewhat unusual thing, that we append that portion of it in full:

"There is one view of the pending cases, however, which is not touched on by the Supreme Court, and which apparently was not brought to the attention of the District Court. Moreover, it has not been brought to our attention by the parties. Yet, if we affirm the decree below, the result would do such gross injustice, and would also establish so unfortunate a precedent, that we cannot overlook the matter.

"The account current between the creditors and the bankrupt shows that, month by month, payment was made for the precise amount of merchandise sold the previous month, as we have already said. The petition in bankruptcy was filed on December 13, 1899. Going back four months, the last transaction prior thereto was on August 10th, which was a sale of merchandise amounting to $128.20. There had also been a sale on August 7, 1899, amounting to $676.01. The total of these two sales was $804.21. On the 13th day of August, just four months before the petition was filed, the bankrupt owed the creditors only this amount of $804.21. The prices of all merchandise sold before that day had been paid, the last payment having been made on August 8th. The account shows the subsequent transactions by virtue of which, although payments were made as already stated, the indebtedness was increased during the four months ending December 13th from $804.21 to the amount proved, $2,174.20—a net increase of indebtedness during that period of $1,369.99.

"While the Supreme Court has adopted a literal construction of the statute in question, and we are bound to follow it, there must nevertheless be a limit to that method of interpretation, and these cases reach it. It is beyond all reason to hold, because a creditor has, in the ordinary course of business, during the four months